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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN L. HARRISON, Defendant and Appellant.	D043081 (Super. Ct. No. CF11410)

APPEAL from a judgment of the Superior Court of Imperial County, Juan Ulloa and Matias R. Contreras, Judges. Affirmed.

Kevin C. McLean, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Robert M. Foster and Gil P. Gonzalez, Deputy Attorneys General for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part III B, C and D.

I.

INTRODUCTION

A jury convicted Adrian Lydell Harrison of battery by a prisoner on a non-confined person while in a state prison (Penal Code, §§ 4501.5, 1170.1 (c)).[1] The jury also found that Harrison had suffered two prior serious or violent felony convictions (§§ 1170.12, subds. (a) - (d), 667, subds. (b) - (i)). The trial court sentenced Harrison to 25 years to life pursuant to the Three Strikes law.

In the published portions of this opinion, we consider Harrison's contention that the trial court erred in failing to hold a competency hearing after defense counsel expressed doubt as to Harrison's competence to stand trial and informed the court that Harrison had made several bizarre comments and had refused to cooperate with his counsel in preparing for trial.

In the unpublished portions of this opinion, we consider Harrison's other claims of error. Specifically, we consider Harrison's claims that: (1) the trial court violated his right to represent himself because the record indicates he made "an unequivocal request" to represent himself "to the extent of his own limited abilities;" (2) the trial court erred in failing to hold a hearing regarding substituting defense counsel, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), because the court should have been aware that defense counsel was providing ineffective representation and that there were irreconcilable differences between Harrison and his attorney; and (3) his defense counsel

was ineffective for failing to produce more evidence of Harrison's incompetence and also for failing to request a hearing regarding substituting defense counsel, in view of the irreconcilable differences between Harrison and himself. We affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On November 23, 2001, Correctional Officer Moises Moya was on duty at a state prison at which Harrison was an inmate. At approximately 10:00 a.m. that day, Moya and his partner, Officer Marin, went to Harrison's cell where they found Harrison lying on the upper bunk bed in his cell. The door to the cell was opened by the control guard. Moya stood in the doorway and informed Harrison that he was going to be moved to a different cell. Upon hearing the news, Harrison asked to speak to the sergeant. Moya told Harrison he would notify the sergeant of Harrison's request. At that point, Harrison came down from the bunk bed, walked up to Moya, and grabbed Moya's uniform near the right shoulder.

Moya attempted to push Harrison away, but Harrison held on to Moya's uniform. The two stumbled onto the lower bunk bed of Harrison's cell. Moya wrapped his arms around Harrison, but Harrison continued to resist. After a brief struggle, Moya and Officer Marin were able to place handcuffs on Harrison. Moya hit his hand on a metal shelf during the struggle.

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1 All subsequent statutory references are to the Penal Code unless otherwise specified.

In July 2003, the People filed a first amended information charging Harrison with a single count of battery on a non-confined person by a prisoner. The information also alleged as an enhancement that Harrison committed the offense while confined in a state prison. In addition, the information alleged that Harrison had suffered two serious or violent prior felony convictions.

The jury convicted Harrison of all charges and found the prior conviction allegations true. The trial court sentenced Harrison to 25 years to life.

Harrison timely appeals.

III.

DISCUSSION

A. The Trial Court Was Not Required to Hold a Competency Hearing Because, Under Controlling Authority, the Record Does Not Contain Substantial Evidence of Harrison's Incompetence

We requested supplemental briefing on the issue of whether the trial court erred in failing to hold a hearing on Harrison's competence to stand trial.

1. The Evidence Regarding Harrison's Possible Incompetence

At the trial readiness conference on June 30, 2003, Harrison's counsel requested that the court have Harrison examined pursuant to section 1368 to determine whether Harrison was competent to stand trial. Counsel stated, "Your honor, pursuant to 1368, I would ask that Mr. Harrison be examined. I've not been able to do much with him. And I believe with my conversations, that he's not mentally able to assist me or defend himself

at trial." The trial court responded that the court had had insufficient contact with Harrison to have formed a doubt as to Harrison's competency.[2]

Defense counsel advised the court that Harrison had made bizarre statements to the effect that the complaining witness in the case—a correctional officer—had been criminally prosecuted in the past, and that the witness was in custody awaiting prosecution at the present time. Counsel informed the court that in fact, the witness had been promoted and was still working for the Department of Corrections.

Counsel added that Harrison had asked him to file a number of baseless motions, and that Harrison had not cooperated with counsel. Defense counsel stated, "I believe, based on my conversations with him, he does not understand the nature of the offense or the actions against him." The court inquired whether defense counsel had any information that Harrison had ever been diagnosed as suffering from a mental condition, and counsel responded that he did not.

When the trial court asked Harrison whether he had anything to say, the following exchange occurred:

> "Harrison: Your honor, sir, I'd like to address the court pro per with counsel. I'd like to have a motion of 99.5 [*sic*] to have this case dismissed.

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2 Pursuant to section 1368, if both the court and defense counsel express a doubt as to a defendant's competence, the court must hold a competency hearing to determine the defendant's competence. In addition to this statutory mandate, as discussed further below, due process requires that a competency hearing be held whenever the record contains evidence that "raises a reasonable doubt about the defendant's competence to stand trial." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1064.)

"The Court: We're not talking about that right now. We're talking about whether you understand the proceedings and whether you can assist the attorney in representing you.

"Harrison: No, I don't sir.

"The Court: You don't understand the proceedings?

"Harrison: No, sir.

"The Court: What do you think we're doing here today?

"Harrison: I have no idea."

However, after the court posed a number of questions about the nature of the proceedings, the functions of the various participants, and Harrison's relationship with his counsel, Harrison stated, "I'm fully aware of what's going on." The court then denied the request for a competency hearing, stating, "It's my view, based on what little information that I have now, that there's some problem. It's impossible to determine what the source of that problem is. The court at this time does not express a doubt as to defendant's competence to proceed."

2. The Law Regarding When a Competency Hearing Must Be Held

a. Federal Cases

In *Pate v. Robinson* (1966) 383 U.S. 375, 378 (*Pate*), the United States Supreme Court held that state procedures must be adequate to protect the due process right of a person not to be tried or convicted while he is legally incompetent. In *People v. Pennington* (1967) 66 Cal.2d 508, 517, the California Supreme Court summarized the *Pate* decision:

> "In *Pate v. Robinson* the court . . . held that defendant Robinson had presented at his trial sufficient evidence of mental incompetence to entitle him to a hearing on present sanity[3] as a matter of right under the due process clause. That evidence consisted of testimony by three of Robinson's close relatives and one family friend relating various acts of Robinson several years before the trial which suggested mental illness. [Fn. omitted.] Two of the witnesses, Robinson's mother and aunt, stated that in their opinion he was insane at the time of trial. His grandfather and the family friend testified that they considered him to be insane at unpredictable periods of time. It was also brought out that he had spent several weeks in a mental hospital some eight years before trial. But he was recovered from his illness when discharged and about two years later was adjudged sane in a restoration proceeding. It was stipulated at Robinson's murder trial that a psychiatrist who had examined Robinson had found him sufficiently sane to stand trial.
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> "The United States Supreme Court held that neither [a] stipulation that a psychiatrist had found Robinson sufficiently sane to stand trial nor Robinson's lucid comments during the trial offered a 'justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior.' (*Pate v. Robinson*, *supra*, 383 U.S. at pp. 385-386.) 'We believe,' states the court's holding, 'that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial.' [Citation.]" (*People v. Pennington, supra*, 66 Cal.2d at pp. 517-518.)

"Under the rule of [*Pate*] a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant *may be* mentally incompetent to stand trial." (*Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666, italics added (*Moore*).) The court in *Moore* explained the use of the term

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3 The Supreme Court in *Pate* noted that, "Although defense counsel phrased his questions and argument in terms of Robinson's present insanity, we interpret his language as necessarily placing in issue the question of Robinson's mental competence to stand trial." (*Pate, supra*, 383 U.S. at p. 385, fn. 6.)

"substantial evidence" in the context of determining a defendant's mental competency to stand trial:

> "Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial." (*Moore, supra,* 464 F.2d at p. 666.)

In *Drope v. Missouri* (1976) 420 U.S. 162 (*Drope*), the United States Supreme Court concluded that evidence that the defendant had previously received psychiatric treatment for bizarre behavior, had attempted to kill the prosecuting witness just before the trial, and had attempted suicide during the time he was on trial, "created a sufficient doubt of his competence to stand trial to require further inquiry on the question." (*Drope, supra*, 420 U.S. at p. 180.) The *Drope* court held:

> "The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Id*. at p. 180.)

b. The California Supreme Court's Application of Pate and Drope

In *People v. Jones* (1991) 53 Cal.3d 1115 (*Jones*), the California Supreme Court adopted the *Moore* court's holding that due process requires a hearing whenever there is evidence in the record that "raises a reasonable doubt about the defendant's competence to stand trial." (*Id*. at p. 1152, citing *Moore, supra,* 464 F.2d at p. 666.) However, while the *Moore* court noted that *Pate* requires a hearing whenever there is "'substantial evidence that the defendant *may be* mentally incompetent'" (*Moore, supra*, 464 F.2d at p. 666, italics added), the *Jones* court held that a defendant must present "substantial evidence of incompetence" before a competency hearing will be required. (*People v. Jones*, *supra*, 53 Cal.3d at p. 1152.)

The California Supreme Court has frequently repeated the holdings of *Jones* and *Moore* that evidence is substantial if it "raises a reasonable doubt about the defendant's competence to stand trial." (*Koontz, supra*, 27 Cal.4th at p. 1064; e.g., *People v. Welch* (1999) 20 Cal.4th 701, 738 (*Welch*); *People v. Frye* (1998) 18 Cal.4th 894, 952 (*Frye*); *People v. Davis* (1995) 10 Cal.4th 463, 527 (*Davis*).) Yet, at the same time, the court has also repeatedly stated that the defendant must present "substantial evidence of incompetence," rather than substantial evidence that the defendant *may be* incompetent, before a trial court will be required to hold a competency hearing. (E.g., *Koontz, supra*, 27 Cal.4th at p. 1063; *Welch*, *supra*, 20 Cal.4th at p. 738; *Frye*, *supra*, 18 Cal.4th at p. 951; *Davis*, *supra*, 10 Cal.4th at p. 527.)

The court's repeated use of the phrase "substantial evidence of incompetence" is potentially misleading in that it suggests that a hearing to determine competency is required only when the record contains evidence *sufficient to find a defendant incompetent*.[4] In fact, at a competency hearing, the defendant must establish by a "preponderance of the evidence" that he is incompetent. (§ 1369, subd. (f).) Evidence that is substantial enough to raise a *reasonable doubt* as to a defendant's competence would not necessarily be sufficient to sustain a finding of incompetence by a *preponderance of the evidence*. Thus, the *Jones* court's omission of the word "may" in its formulation of the quantum of evidence necessary to require that the trial court hold a competency hearing—although possibly inadvertent—appears to have resulted in a confusing legal standard that is difficult to apply.

Harrison's bizarre statements and his counsel's statement that, based on his conversations with Harrison, he believed Harrison did not understand the nature of the proceedings constituted the primary evidence of Harrison's possible incompetence. Although *Pate* and *Drope* suggest that such evidence may be sufficient to raise a reasonable doubt about the defendant's competence, California Supreme Court case law indicates otherwise.

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4 Substantial evidence is ordinarily understood to mean evidence that is sufficient to support a finding. (E.g., *People v. Tenner* (1993) 6 Cal.4th 559, 567 ["Our function, as an appellate court, has been to review the record in the light most favorable to the judgment [citation] to determine whether substantial evidence supports the fact finder's conclusion, i.e., whether a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt"].)

The California Supreme Court has repeatedly held that "more is required to raise a doubt [of competence] than mere bizarre actions [citation] or bizarre statements . . . ." (*People v. Danielson* (1992) 3 Cal.4th 691, 727, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; e.g., *Davis, supra*, 10 Cal.4th at p. 527.) It is difficult to reconcile these holdings with the fact that the *Pate* court's determination that a competency hearing was required in that case was based primarily on the defendant's "irrational behavior." (*Pate, supra,* 383 U.S. at pp. 385-386 [holding due process mandated competency hearing be held because there was "no justification for ignoring the uncontradicted testimony of [defendant's] history of pronounced irrational behavior"].) Further, in *Drope*, the United States Supreme Court expressly held that evidence of irrational behavior may constitute sufficient evidence of incompetence to require further inquiry into a defendant's competence. (*Drope*, *supra*, 420 U.S. at p. 180.)

The California Supreme Court has also suggested that where the primary evidence of incompetence stems from a defendant's inability to cooperate with his lawyer, the defendant *must* present expert testimony regarding his incompetence in order to gain the right to a competency hearing. In *People v. Stankewitz* (1982) 32 Cal.3d 80 (*Stankewitz*), the Supreme Court stated:

> "It is emphasized that appellant's inability to assist his counsel was found by a qualified psychiatrist to be the product of a genuine mental disorder. An accused's refusal to cooperate with a particular appointed lawyer in hopes of obtaining another one would not trigger the necessity of a competency hearing *unless a qualified*

> *psychiatrist testified that such a refusal was the product of a mental disorder*." (*Id*. at p. 93, fn. 7, italics added.)

However, in *Pate*, the United States Supreme Court held that a competency hearing was required notwithstanding the lack of any expert testimony as to the defendant's possible incompetence. (*Pate, supra*, 383 U.S. at p. 385, fn. 7.) In fact in *Pate*, the court held that a competency hearing was required despite the fact the defendant stipulated that a psychiatrist would testify that, in his opinion, the defendant knew the nature of the charges against him and was able to cooperate with counsel when the psychiatrist examined him two or three months before trial. (*Id.* at p. 383.) Similarly, in *Drope* the court observed that substantial evidence of a defendant's possible incompetence may be present without expert testimony. (*Drope, supra,* 420 U.S. at p. 180; see also *People v. Ary* (2004) 118 Cal.App.4th 1016, 1024 ["reject[ing] the People's suggestion that substantial evidence of incompetence must be established by an expert who specifically testifies that the defendant, due to mental retardation, is not competent to stand trial"].)

The California Supreme Court has also concluded that no competency hearing was required in a number of cases in which the evidence was clearly sufficient, in our view, to raise a reasonable doubt as to the defendant's competence. For example, in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1107-1112 (*Rodrigues*), defense counsel expressed his concern to the court that the defendant was not competent to proceed with a preliminary hearing because he had refused to cooperate with counsel. In addition, the defendant had suffered from seizures as a young child and migraine headaches throughout his entire life. (*Id*. at p. 1108.) Further, one defense psychiatrist said that the "defendant had brain

damage due to the 'two major seizures'" (*id*. at pp. 1108-1109), and a second psychiatrist stated:

> "I suspect that there is a drug dementia; that [the defendant] has difficulties that have been outlined earlier which are secondary to that drug dementia. That one of the reasons he wouldn't sign anything, as he just said, was he doesn't understand. It is going to be difficult for him to understand anything if his brain isn't working well. [¶] I have etiological events in the record, which is to say a considerable amount of poly substance abuse dating way back, dating as far back as 4/2/87 for example, and as late as May 25th, '87. [¶] It seems to me that a person of this level of drug use is at very high risk for a neurological impairment *that would make it very difficult for him to cooperate with his defense*." (*Rodrigues, supra*, 8 Cal.4th at p. 1109, italics added.)

The California Supreme Court held that this evidence was not sufficient to raise a reasonable doubt as to the defendant's competence. (*Id*. at pp. 1110-1112.)

Similarly, in *Frye*, *supra*, 18 Cal.4th at p. 948, a doctor testified that the defendant suffered from "static encephalopathy," which might result in personality problems, intolerance of stress, lack of initiative or self-drive, and difficulty with memory. In addition, the Supreme Court summarized the testimony of a psychiatrist who had interviewed the defendant more than 20 times in order to determine his competency as follows:

> "[D]efendant was brain damaged due to an automobile accident occurring when he was 15 years old that resulted in a fracture at the base of defendant's skull which led to 5 episodes of meningitis. The residual effects of the meningitis left defendant with certain psychological and neurological defects.
>
> "According to Dr. Peal's testimony, the impairment in defendant's brain functions manifests itself in stressful situations, and results in a clouded consciousness. This condition does not mean defendant is

> insane, pathological or psychotic. Rather, when under stress or the influence of drugs or alcohol, defendant's ability to think and recall, as well as his emotional control and behavior are impaired. Dr. Peal found the stress defendant felt while waiting in jail resulted in memory problems, depression, agitation, and suspicion." (*Id*. at p. 949.)

Further, defense counsel in *Frye* had informed the court that the defendant's mental difficulties prevented him from retaining information long enough to properly prepare to testify. (*Frye, supra*, 18 Cal.4th at pp. 949-951.) Notwithstanding this considerable evidence that the defendant had mental problems, the Supreme Court held that no competency hearing was required. (*Id*. at p. 952.)

Thus, while, the California Supreme Court has repeatedly stated that a competency hearing is required whenever there is evidence that "raises a reasonable doubt about the defendant's competence to stand trial" (*Koontz, supra,* 27 Cal.4th at p. 1064), in practice, the court has essentially required that the defendant establish his incompetence before a trial court will be required to hold a competency hearing. In our view, the holdings in these cases appear to have lost sight of the fact that, "[t]he function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency." (*Moore, supra*, 464 F.2d at p. 666.)

3. The Record Does Not Contain Evidence Sufficient to Raise a Reasonable Doubt as to Harrison's Competence, Under Binding California Supreme Court Authority

If we were writing on a blank slate, we would conclude that the evidence of Harrison's incompetence was sufficient to require the trial court to hold a competency hearing. Although the evidence in the record of Harrison's incompetence is equivocal, it is, in our view, sufficient to necessitate a hearing at which his competency could be more fully explored. In particular, defense counsel's expression of concern regarding his client's competency together with Harrison's bizarre statements regarding the complaining witness were sufficient to raise a reasonable doubt as to Harrison's competency.

However, our Supreme Court has held that such evidence does *not* constitute sufficient evidence of incompetence to require a competency hearing. (E.g., *Danielson*, *supra*, 3 Cal.4th at p. 727 [bizarre statements are not substantial evidence of incompetence]; *People v. Stankewitz*, *supra*, 32 Cal.3d at p. 93, fn. 7 [expert testimony regarding incompetence is required where evidence of incompetence stems from refusal to cooperate]; *Rodrigues, supra,* 8 Cal.4th at p. 1112 [defense counsel's statement that defendant may be incompetent not sufficient to require competency hearing].) Further, the Supreme Court has rejected claims that competency hearings were required in cases in which there was more evidence of possible incompetence than exists in this case. (*Frye*, *supra*, 18 Cal.4th at pp. 948-952; *Rodrigues, supra,* 8 Cal.4th at pp. 1107-1112.)

Thus, binding Supreme Court case law compels us to conclude that the record does not contain substantial evidence of Harrison's incompetence, and that the trial court did not err in failing to hold a competency hearing.

B. The Trial Court Did Not Violate Harrison's Right to Represent Himself Because Harrison Never Requested That He Be Allowed to Represent Himself

Harrison claims the trial court violated his right to represent himself at trial.

A defendant has a constitutional right to represent himself at trial.

> "When 'a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's "technical legal knowledge" is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself.' (*People v. Windham* (1977) 19 Cal.3d 121, 128 [137 Cal.Rptr. 8, 560 P.2d 1187] (*Windham*), quoting *Faretta* [*v. California* (1975)] 422 U.S. [806,] 836 [95 S.Ct. 2525, 45 L.Ed.2d 562].) Erroneous denial of a *Faretta* motion is reversible per se. [Citation]." (*People v. Dent* (2003) 30 Cal.4th 213, 217 (*Dent*).)

However, a defendant must unequivocally request that he be allowed to represent himself.

> "Unlike the right to representation by counsel, ' "[T]he right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*." ' (*People v. Marshall* (1997) 15 Cal.4th 1, 21 [61 Cal.Rptr.2d 84, 931 P.2d 262] (*Marshall*); *id*. at p. 23 ['[T]he court should draw every reasonable inference against waiver of the right to counsel']; see *Brewer v. Williams* (1977) 430 U.S. 387, 391, 404 [97 S.Ct. 1232, 1242, 51 L.Ed.2d 424] ['courts indulge in every reasonable presumption against waiver' of the post arraignment right to counsel].) In determining on appeal whether the defendant invoked the right to self-representation, we examine the entire record de novo. (See *Marshall*, at pp. 24-25.)" (*Dent, supra*, 30 Cal.4th at p. 218.)

In this case, Harrison never asked to be allowed to represent himself. Despite the lack of such a request, Harrison argues that the record indicates he made "an unequivocal request" to represent himself, "to the extent of his own limited abilities." He argues that his failure to more clearly express his desire to represent himself stemmed from his lack of legal training and the fact that he had "personal issues" that were significant enough to warrant his counsel's request for a competency hearing.

During a pretrial hearing Harrison stated, "Your Honor, sir, I'd like to address the court *pro per with counsel*. I'd like to have a motion of 99.5 [*sic*] to have this case dismissed." (Italics added.) Harrison also notes that defense counsel told the trial court that he was having serious difficulties communicating with his client. When the court questioned Harrison regarding the lack of communication with his defense counsel, Harrison again stated: "Your Honor, sir, before we proceed any further with this matter, I would like to file a motion of 999.5—999.5 to have this matter dismissed." Harrison maintains that his filing of two motions, his use of the term "pro per," and his failure to communicate with his attorney indicated that he desired to represent himself.

We disagree. The record does not remotely suggest that Harrison "articulately and unmistakably demand[ed] to proceed *pro se*." (*Marshall*, *supra*, 15 Cal.4th at p. 21.) The record indicates merely that Harrison desired to have his case dismissed and that he was having difficulties communicating with his attorney. We conclude the trial court did not violate Harrison's right to represent himself because Harrison never invoked this right in the trial court.

C. The Trial Court Did Not Err by Failing to Hold a Marsden Hearing Because Harrison Never Indicated that He Wanted Substitute Counsel

Harrison claims the trial court erred in failing to hold a hearing to substitute defense counsel pursuant to *Marsden*, *supra*, 2 Cal.3d 118. "[W]e review a trial court's decision declining to relieve appointed counsel under the deferential abuse of discretion standard. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.)

"A defendant seeking to discharge appointed counsel and substitute another attorney must establish either that appointed counsel is not providing adequate representation or 'that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 795, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 854, abrogated on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 365.)

In *People v. Valdez* (2004) 32 Cal.4th 73, 97, the Supreme Court reviewed the circumstances under which a trial court must hold a hearing to determine whether a defendant is entitled to a substitute attorney:

> "'Although no formal motion is necessary, there must be "at least some clear indication by defendant that he wants a substitute attorney." ' (*People v. Mendoza* (2000) 24 Cal.4th 130, 157, 99 Cal.Rptr.2d 485, 6 P.3d 150, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8, 247 Cal.Rptr. 1, 753 P.2d 1052.) 'The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing.'"

The *Valdez* court also noted that where a "defendant's comments [a]re insufficient to indicate that he was requesting a *Marsden* hearing, 'the trial court [i]s under no

obligation to conduct an inquiry into any dissatisfaction defendant might have with his appointed counsel so as to necessitate substitution of counsel.'" (*Valdez, supra*, 32 Cal.4th at p. 97.)

Harrison acknowledges that he "did not specifically request new counsel."[5] Nevertheless, he argues that the trial court was required to hold a *Marsden* hearing for two reasons. First, Harrison maintains that because defense counsel expressed a concern regarding Harrison's competency but failed to provide substantial evidence of such incompetence by way of expert testimony, it should have been clear to the trial court that defense counsel was providing ineffective representation. Second, Harrison contends that because the record is replete with evidence of a breakdown in the relationship between Harrison and defense counsel, the trial court should have been aware that defense counsel could not provide effective representation.

Neither the fact that defense counsel failed to present expert testimony regarding Harrison's competency nor the fact that there appeared to be a breakdown in the relationship between Harrison and defense required the trial court to inquire, sua sponte, into Harrison's desire for substitute counsel. Accordingly, because the record contains no "clear indication by [Harrison] that he want[ed] a substitute attorney," we conclude the trial court did not err by failing to hold a *Marsden* hearing. (*Valdez*, *supra*, 32 Cal.4th at p. 97.)

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5 We note that the court's minutes for July 1, 2003 expressly state, "There is no indication of a *Marsden* motion."

D. Harrison Cannot Prevail on His Ineffective Assistance of Counsel Claim in This Direct Appeal

Harrison claims his counsel was ineffective for failing to present substantial evidence of his incompetence and failing to request a *Marsden* hearing.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below a standard of reasonable competence, and that there is a reasonable probability the result would have been more favorable in the absence of his counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) When a claim of ineffective assistance is made on direct appeal and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation for counsel's actions. (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

Harrison claims his counsel was ineffective for two reasons. First, Harrison argues that he received ineffective representation because his counsel expressed a doubt as to Harrison's competence but failed to provide the court with enough evidence of incompetence to require a competence hearing. We concluded in part III A, *ante*, that the record does not contain substantial evidence of Harrison's incompetence, under controlling precedent. It necessarily follows that Harrison cannot establish prejudice from his counsel's failure to provide substantial evidence of his incompetence on direct appeal, because the record does not indicate whether additional evidence of Harrison's

incompetence exists. Accordingly, we conclude that Harrison cannot prevail on his claim that his counsel was ineffective for failing to provide to the court substantial evidence of his incompetence.

Harrison also claims his counsel's failure to request a *Marsden* hearing constituted ineffective representation, in view of the irreconcilable differences that existed between Harrison and his counsel. However, the record does not indicate that Harrison expressed a desire to substitute counsel. Accordingly, we conclude that Harrison cannot prevail on his claim that his counsel was ineffective for failing to request a *Marsden* hearing.

IV.

CONCLUSION

Although we would conclude otherwise if we were considering in the first instance what constitutes "substantial evidence of incompetence," under binding California Supreme Court authority, the record does not contain evidence of Harrison's incompetence sufficient to have required that the trial court sua sponte hold a competency hearing.

As to Harrison's other claims, the trial court did not violate Harrison's right to represent himself because Harrison never requested that he be allowed to represent himself. Further, the trial court did not err by failing hold a hearing regarding substituting counsel because Harrison never indicated he wanted different counsel. Finally, Harrison's claim that his counsel was ineffective for failing to produce substantial evidence of his incompetence and failing to request a *Marsden* hearing fails because

Harrison has not shown that that substantial evidence of his incompetence existed, under controlling precedent, and does not indicate he expressed a desire to substitute counsel.

V.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.